

INTRODUCTION

On July 27th, 2009, Senate President Pro Tem Charlie Shields requested that the Senate Commerce Committee, chaired by Senator Brad Lager, gain further information regarding delayed reporting by the Department of Natural Resources of elevated E. coli levels at the Lake of the Ozarks. Senator Shields specifically asked that the Commerce Committee make recommendations to the General Assembly as to whether public policy alterations could be achieved, either through state statute or administrative rule, to ensure timelier reporting of such levels in the future. Specifically, the stated objective of the committee's work was to conduct a "policy review" of the procedures regarding E. coli testing at the Lake of the Ozarks.¹ Unfortunately, the investigation by partisan Republican caucus staff did not follow the well-intended charge from Senator Shields, as the investigation quickly degenerated into an overtly political endeavor. The concept of the aforementioned "policy review" morphed into a thinly veiled rationale for the on-going political witch hunt -- rife with intimidation, threats of subpoenas, blanket demands for all communications of all DNR employees, and strategic press leaks of selective facts intended to inflict political harm on the administration.

This Minority Report is intended to serve two primary functions. First, and most importantly, this report will offer public policy recommendations designed to better ensure the health and safety of all individuals who enjoy Missouri's public bodies of water. Second, this Minority Report will offer multiple rebuttals to the factually challenged report (hereafter referred to as the "Majority Report") that has already been signed by the Republican members of the Commerce Committee and distributed to the press. It is regrettable that this Minority Report had to be composed. However, the undersigned Senators believe that it is both necessary and prudent to respond to the false allegations contained in the Majority Report, as well as to offer public policy recommendations that will better serve the public than those contained in the report offered by the Republican majority of the committee.

¹ Information culled from the notes of a (non-partisan) Senate Research analyst assigned to the Commerce committee.

BACKGROUND

To begin, it should be clearly stated that there are two separate testing programs currently conducted by the Department of Natural Resources at the Lake of the Ozarks. There appears to be general confusion regarding the purpose and administration of each program.

The first program involves weekly monitoring and testing at the two public beaches in the Lake of the Ozark State Park. The Department of Natural Resources' Parks Division is responsible for collecting these samples each week and analyzing them. The results from these samples are used to determine whether public beaches are open or closed.

The second testing program is a five year study funded by Ameren, the publicly traded electric utility with a generating facility at the Lake of the Ozarks, as a result of a settlement agreement in 2005 that provided the Department of Natural Resources with \$15,000 a year for five years in order to implement a regimen for obtaining monthly water samples (May through October) from dozens of locations throughout the Lake of the Ozarks. These samples are obtained by volunteers of the Lake of the Ozarks Watershed Alliance. Once acquired, these samples are delivered to the Department of Natural Resources for testing and analysis. It is essential to note that the Ameren-funded study was never meant to be used as a public health information tool to determine if and/or where it was safe for the public to swim. The objective of the study was solely to accomplish a five-year-long bacteriologic study of the lake.

The information contained in Senator Lager's "Majority Report" would have one believe that, before the samples taken on May 26, 2009 that sparked the inquiry, all data collected under this program were promptly reported to the public in the strict timeline presented in his report. This characterization is blatantly misleading. Before the May 26, 2009 samples, there are several instances, detailed below, in which the E. coli data were not reported in the timeline contained in the Majority Report.

It is also vital to note that the means used to acquire E. coli data is not well suited for use as a public warning system. Each test result requires, at a minimum, several

days to process. This piece of information, coupled with the fact that E. coli levels are highly ephemeral in nature, means that elevated levels detected on a Monday are almost certain to be obsolete by the weekend. In other words, even if the E. coli data collected for the purposes of a five-year health-of-the-lake study were released to the public as soon as possible, the accuracy of such data would be all but meaningless when determining whether it is safe for the public to swim at that particular location of the lake.

THE POLITICAL INVESTIGATION

On May 26th, 2009, the first samples of the summer were taken by volunteers from Lake of the Ozarks Watershed Alliance and sent to the Department of Natural Resources lab for analysis. No one refutes the fact that the results were extraordinarily high. According to statements made directly to the committee by Joe Bindbeutel, who at the time of the elevated readings was the Deputy Director of the Department of Natural Resources, he made the decision to temporarily withhold the information so the department could put the elevated reading in proper context. According to his testimony before the committee, Mr. Bindbeutel believed that the outdated results were not indicative of current conditions at the lake; therefore he saw no reason to rush the release of the data as to do so would have confused the more salient issue. To Mr. Bindbeutel, it was more important to find the cause of the pollution, take action to avoid it in the future, and explain it all to the public in context rather than simply "dumping" the information to the public without providing proper context for the elevated numbers. In order to find this desired context, Mr. Bindbeutel tasked different people at the department with creating an action plan and an explanation for why (e.g. heavy rain, migrating geese, faulty septic systems) the levels were so elevated.

Regardless of whether one agrees or disagrees with Mr. Bindbeutel's logic and judgment in this instance, it is clear that his decision, for which he has taken full responsibility, was grounded in providing constructive information to the public. After reviewing all of Mr. Bindbeutel's testimony, it is evident that his decision was not part of a conspiracy to protect financial interests at

the Lake of the Ozarks. To allege otherwise is irresponsible.

It is interesting to note that the Majority Report all but ignores Mr. Bindbeutel's testimony. Here the central figure of the inquiry sat not once but twice before investigators and took full responsibility for withholding the data in question and gave his rationale for doing such. Yet the Majority Report makes almost no mention of Mr. Bindbeutel's appearance, as his statements to the committee apparently did not fit with the predetermined result on which Senator Lager was fixated. Even the most kangaroo of courts typically acknowledge the testimony of a witness who openly admits to the alleged crime. Ironically, one of the few references to Mr. Bindbeutel in the Majority Report is a complaint that he had the audacity to give an interview to the Kansas City Star. No mention is made to the fact that Mr. Bindbeutel appeared before the Senate panel on October 1, 2009 as well as before the full Commerce Committee on January 5, 2010.

From the beginning, it has been apparent that Senator Lager's interest in the elevated E. coli levels was overtly political in nature and certainly not grounded in any concern for the environment or the public good. As an illustration of this point, consider the past late reporting of similar data in the years before the election of Governor Nixon. Senator Lager has repeatedly asserted that the late reporting of elevated E. coli levels in May and June of 2009 demonstrates a monumental failure on the part of the Nixon administration. However, similar delays occurred under the immediately previous administration of Governor Matt Blunt. Below is a schedule of previous years' reporting of data from the Ameren settlement agreement water testing program, which demonstrates that on several occasions under the Blunt Administration the data were not reported in a timely manner. Specifically:

- May 27, 2007 data were not reported until June 18, 2007.
- June 11, 2007 data were not reported until June 26, 2007.
- October 6, 2008 data were not reported until October 22, 2008.

The Majority Report concludes (without any evidence having been presented) that the Department of Natural Resources had never in the past failed to notify public health

agencies of high bacteria levels in water samples. In the Majority Report's conclusion, titled "FAILURE TO NOTIFY," an assertion is made categorically that the Department of Natural Resources had always notified the State Department of Health as well as local public health authorities, stating:

"Possibly the greatest failure lies in the fact that DNR failed to notify the Missouri Department of Health and Senior Services (DHSS) or any Lake Ozark area public health departments of the high May 26th, 2009 sampling. This is both disturbing and odd given the fact that DNR and DHSS have a memorandum of understanding requiring DNR to inform DHSS of any public health risks, an action that DNR took in every instance prior to the May 26th, 2009 test."

This above statement is misleading. An independent investigation of water sampling practices at the Department of Natural Resources revealed that in no fewer than 12 instances between April 19, 2005 and the tests of May 26, 2009, the department had water samples showing dangerously high levels (10 times the allowable limit) of E. coli. In those instances, all of which occurred during the Blunt Administration, no public notification of the danger was given by public health agencies or the Department of Natural Resources. The report takes great pains to gloss over historical failures to close beaches. The report states:

"DNR's Division of State Parks (parks) operates numerous public beaches around the state including two public beaches at the Lake of the Ozarks, known simply as Public Beach #1 (PB#1) and Public Beach #2 (PB#2). For nine years Parks has tested the water at these beaches for E. coli weekly, closing the beaches when E. coli levels have exceeded the 235 SSM."

The Majority Report's language is again not factual, as it lends the false impression that failure to close beaches due to high bacteria was a phenomenon unique to the current administration at the Department of Natural Resources. In fact, the record shows that while there were five instances in 2009 of failure to close state park beaches in accord with written protocols, there were a minimum of five such instances between July 2007 and October 2008 as well, all during the Blunt Administration. Further, the report

suggests that press coverage of water quality issues generated the current investigation, yet the committee failed to act in the face of previous reporting on water quality shortcomings. The report states:

"Lake area media outlets began questioning DNR about public beaches [sic] closures and the May and June Ameren UE [sic] testing results, but no official responses were given until June 19th and the Ameren UE [sic] sampling results from May were not released until June 26th. On July 16th, Karen Dillon from the Kansas City Star reported on the high E. coli levels and the lack of information about them from DNR."

However, more than a year earlier, on Aug. 17, 2008, Karen Dillon wrote a story in the Kansas City Star titled "Raw sewage fouls Lake of the Ozarks." That story, about a massive sewage spill that took place in August 2007, stated:

"A year ago state inspectors spotted thousands of gallons of raw sewage spilling from a wastewater system into the Lake of the Ozarks. But residents and vacationers spending lazy days swimming, boating, skiing and fishing in that part of the lake were not warned about it."

In that story, DNR officials disclaimed any responsibility for notifying the public about water quality risks. Dillon reported:

"DNR officials said, however, that their mission was to regulate pollution in state water bodies. 'Local health departments, they are the ones that make the call to notify,' Hess said."

It is relevant to note that despite the aforementioned article appearing in one of the state's most circulated newspapers, the Senate Commerce Committee, and its then-vice chair, Senator Lager, never spent a single moment investigating the matter.

No instance better demonstrates the political nature of the investigation as the dissemination of the testimony by Susanne Medley. Senator Lager assembled a three person

panel of Senate employees² to interview select DNR employees in the course of this investigation. When the panel's first day of interviews was completed on September 8, 2009, it took over a week for the Senate office support staff to transcribe the taped conversations. But when the panel interviewed ex-DNR spokeswoman Susanne Medley on Tuesday, September 22, her testimony was transcribed in record time. By Thursday, September 24, Terry Ganey reported in the Columbia Daily Tribune that Ms. Medley "told an official in the governor's office about the high bacteria levels about a month before they were made public." This timeline is interesting. First, it took over a week to transcribe what were relatively short interviews. But when a witness said something that could potentially be harmful to Governor Nixon, that lengthy conversation was transcribed immediately. Why was that particular transcript completed so quickly, and more importantly, how did the press know to ask for that specific transcript on that specific day in time for the Thursday papers? Also, it is interesting to note that once the press stopped writing E. coli stories on a daily basis, the panel suddenly stopped interviewing witnesses altogether.

The biased nature of the Majority Report can be viewed as a metaphor for of the one-sided nature of the entire investigation. It is obvious that the crafters of the Majority Report did not let facts get in the way of a good story. Consider this excerpt from the Majority Report regarding an alleged statement by Mr. Bindbeutel:

"Additionally, the committee obtained minutes from a June 12th, 2009 meeting with LOWA where Joe Bindbeutel tells to the group that, "The recent water testing has drawn the attention of the Director of DNR as well as Governor Nixon". While Bindbeutel has denied saying this, Scott Robinett confirmed during an interview with committee staff that he heard it and the woman taking the minutes stated in a KC Star article that if it was in the minutes, she heard it."

² The three person panel of Senate employees consisted of: Mr. Brendan Cossette, Legal Counsel for the Senate Majority Caucus; Mr. John Burton, the Senate Investigator; and (at the request of Senator Tim Green) Mr. Donald Thalhuber, Policy Director for the Senate Minority Caucus. Also, Ms. Patricia Churchill, from the Attorney General's Office, was present for the interviews.

The above statement is an absolute misrepresentation of what Mr. Robinett told the panel on September 8, 2009. As the following verbatim excerpt from the transcript of Mr. Robinett's interview clearly demonstrates, Mr. Robinett did not hear Mr. Bindbeutel tell the group that "the recent water testing has drawn the attention of the Director of DNR as well as Governor Nixon." In fact, Mr. Robinett specifically states he did not recall Mr. Bindbeutel's exact words, the statement "wasn't in quotation marks," and that "what he (Mr. Bindbeutel) meant by that I don't know."

"BURTON: Did he indicate that anybody else outside of DNR, whether it be the Governor's office, or anybody else, was interested, was involved, was trying to understand? Do you recall that?

ROBINETT: I don't recall per say but I'm sure you are aware of this, but, there was a LOWA person there that was dictating, taking notes anyway. They had printed up a meeting minutes, and within that meeting minutes she had written down that, and it wasn't in quotation marks and I don't recall his exact words, but he said something to the effect of the Governor's office being interested. What he meant by that I don't know, and he wasn't asked any further.

BURTON: When you say he...

ROBINETT: I'm sorry, Joe Bindbeutel.

BURTON: OK.

THALHUBER: When you said that someone put this in the minutes, did you hear anyone mention the Governor's name, do you recall?

ROBINETT: I remember him saying something to the effect that the Governor's office was interested. Whether he meant specifically on that project or that data, I don't know, he didn't elaborate."

While there is no doubt that the Majority Report mischaracterizes Mr. Robinett's words regarding the alleged statement by Mr. Bindbeutel, the report completely ignores the testimony of Mr. Earl Pabst, who, when asked by the Senate panel about the same meeting, asserts that the statement attributed to Mr. Bindbeutel was false.

Consider the following excerpt from the panel's interview of Mr. Earl Pabst on September 22, 2009:

"BURTON: Okay. There was an individual from LOWA, and I do not recall her name, who was taking minutes - officially or unofficially, and after that meeting, those minutes were published. And there was a, her interpretation of one of the statements that was made by Mr. Bindbeutel was that Mr. Bindbeutel was impressing upon the people at LOWA that the governor's office was aware of the high readings that had taken place from the May sampling. Do you recall any statement along that line or your interpretation?

PABST: Actually, I recall that statement and her notes are incorrect.

BURTON: Okay.

PABST: What Mr. Bindbeutel was referring to was the stimulus funding and perhaps the ability of the local areas, if they wanted to pursue things like regionalization to take advantage of stimulus funding for loan and grants to expand their wastewater treatment facilities and the lady who was taking the notes got that completely out of context. And I read the minutes. Donna Swall sent me the minutes, as well, as an email. She got that out-of-context.

BURTON: Okay. And I don't remember what the minutes said verbatim, and I don't have a copy of that in front of me, but by reading the minutes as you just said, one would assume, or my interpretation as one would assume, Mr. Bindbeutel is speaking about the May sampling and that it had come to the attention of the governor's office. What you're indicating is that your interpretation was that was taken out of context. It was a completely different conversation taking place and that the governor's office was aware of the fact that there was stimulus money available?

PABST: Mr. Bindbeutel was explaining to the Watershed Alliance members about the wastewater funding through the stimulus that the department was receiving for loans and grants. And it was in that context that he was talking, the discussion at that point was more

general. It was away from the specifics of the E. coli and the high data results.

BURTON: Okay. And I apologize, I just don't understand how the governor's office would be involved in that part of the...

PABST: The governor's office has been extremely involved in the department's decisions regarding the stimulus funding and how we shape what we call our (inaudible) plan as we develop that. All of those went through the governor's office for approval.

BURTON: Oh, okay, I understand. So the idea about the governor's office being aware of it, that's the part she's got completely out of context.

PABST: Correct.

BURTON: The governor's name came up, or the governor's office came up, as it relates to the stimulus money.

PABST: Correct."

At the Commerce Committee hearing on January 5, 2010, Senator Lager is on record telling Democratic members of the committee that they would have a chance to read the report and ask questions before a report would be issued. However, instead of circulating a draft report and getting feedback from committee members, as is typical practice in the Missouri Senate, Senator Lager distributed a report, drafted without consultation of any member of the Democratic caucus. Minority Caucus members were told upon receipt of the report that Senator Lager "already had enough signatures to turn the report in, and (the Democratic members of the committee) could sign it or not." Aside from neglecting the usual Senatorial courtesy of allowing committee members the opportunity to actually read the report and make suggestions for alterations before final approval, Democratic members discovered that Senator Lager had already leaked a copy of the report to various media outlets, which ran stories quoting large sections of the report by mid-afternoon on the 25th. Senator Lager's tactics proved effective, as the media reported his version of the so-called investigation, as no opportunity was given to Democratic members of the committee to make corrections

or alterations prior to dissemination to the media. Further, the Department of Natural Resources, the subject of much derision in the report, did not even possess a copy of the report when media outlets began asking for reactions, all but assuring Senator Lager's version was widely reported without scrutiny. Also, Mr. Donald Thalhuber, the Policy Director for the Democratic Caucus who, at the request of Democratic Senator Tim Green had been named to the three-person "investigating" panel to represent the interests of the Democratic Caucus, was not made aware that a report had been drafted and was not given a copy of the draft report. This took place despite the fact that Mr. Thalhuber participated in the interviews of all of the witnesses and worked closely with the investigation for several months.

Another bewildering aspect of the Majority Report is the extensive and somewhat peculiar "OBSTACLES" section. Here the Majority Report goes to great lengths to detail the perceived "road blocks" the Republican caucus staff encountered when trying to set up interviews with certain DNR employees. The report bemoans the fact that DNR Director Mark Templeton and Senator Lager had to negotiate "ground rules" so that committee staff could interview state employees. If the roles were reversed, and partisan representatives of the Executive Branch suddenly demanded to interrogate certain members of the Legislative Branch on the record for purposes of a partisan investigation, it is highly doubtful that the Legislative Branch would comply with such a request. At a minimum, ground rules for the interviews would certainly be established.

Further, imagine what would happen if partisan representatives of the Executive Branch suddenly demanded access to all of the electronic communications of all members of the Legislative Branch for purposes of a partisan investigation. It is difficult to imagine a scenario whereby the Legislative Branch would comply with such a demand. However, if for some reason the Legislature were complicit in such a request, certain personal communications with no bearing on the investigation would certainly not be supplied. Yet the Majority Report bemoans the fact that the General Counsel for the Department of Natural Resources had the gall to withhold certain personal communications unrelated to the investigation. The Majority Report goes so far as to complain that the email communications handed over by the department were not in

sequential order, contained no guide or directory, and were in unsearchable PDF files. Of course, the Majority Report is silent regarding the fact that of all of the literally hundreds of thousands of email correspondence handed over by the department, not one email displayed what even looked like a cover up, or any attempt to subvert the public trust on the department's part. The question must be asked: Was it worth demanding all of those emails from the department? Was it worth reading state workers' private communications so this utterly biased report could be constructed?

Once Democratic members of the committee realized that Senator Lager was going far beyond an inquiry into weaknesses in public policy that may have led to a delay in the reporting of the test result, they came to understand that his intention was to interview numerous employees of the Department of Natural Resources under extremely intimidating circumstances: The original plan was to call them in alone to "testify" before three Republican Senate employees, one of whom was a high-ranking Department of Natural Resources official of the Blunt Administration. Only after Democratic members protested was Mr. Thalhuber added to the "investigating" panel and an attorney from the Attorney General's Office allowed to accompany department employees.

The Majority Report draws conclusions about alleged violations of Sunshine Law without referencing the independent Attorney General investigation of the matter. In the Majority Report's "SUNSHINE LAW VIOLATIONS" section, it claims that the method with which the Department of Natural Resources dealt with requests for information was at a minimum in violation of the spirit of the Sunshine Law. However, on August 12, 2009, Attorney General Chris Koster made public the results of the investigation conducted by his office, concluding that the department had not violated the state's open records laws. The Attorney General's report stated, "No individual or organization made a request for information that was intended as, or should have been interpreted by DNR, as a Sunshine Law request." It is troubling that such a conclusion about a matter as serious as violations of open records laws was publically made without even a reference to an investigation and report on the matter by the state's highest ranking law enforcement officer.

Another troubling aspect with regard to the Majority Report is the clear obsession with who in the Governor's Office knew what and when, at the cost of a thorough discussion of the relevant public policy issues at hand. As discussed throughout this report, the Majority Report is so biased and untrustworthy, through the use of hearsay, unsubstantiated claims, and highly selective use of "facts" in pursuit of predetermined political ends, that any discussion of who knew what in the Governor's Office is simply unreliable. There is no credible evidence in the Majority Report or in any testimony heard by the committee that the Governor or his Chief of Staff had any knowledge of the elevated E. coli levels before June 23rd, 2009, when Mr. Bindbeutel met with the Governor's Chief of Staff and briefed him on the issue.

The Majority Report plainly asserts that E. coli in the Lake of the Ozarks did make people sick, despite no evidence of a causal effect having been presented to the "investigating" panel or the committee at a public hearing. The evidence provided for such claims was that other people "received emails from people who were sick or knew others who got sick after swimming in Lake of the Ozarks this summer." The only reason to include such a statement in the report is to suggest causation regarding late reporting of E. coli data and instances of illness resulting from such. The drafters of the Majority Report did not gather any useful information about these ill citizens, which may have allowed some attempt at causation, or at a minimum, some level of correlation, between the delayed reporting and rates of infection.

POLICY RECOMMENDATIONS:

While there are several other troubling aspects of the Majority Report, this Minority Report will now turn to the important task of making non-political public policy suggestions based on evidence from the testimony heard by the panel and committee. Therefore, the signers of this Minority Report urge the General Assembly to consider the following recommendations for action:

- Any policy recommendation must discuss the core problem with Missouri's current clean water policy: the lack of a real-time testing system to notify the

public about elevated bacteria levels. If the state is serious about warning the public about elevated E. coli levels in a constructive and useful manner, a means of real-time testing should be developed and instituted. Of course, significant additional funding would be required to achieve this end. Strangely, the only mention of real-time testing in the Majority Report is negative in tone: "...a comprehensive solution cannot rely solely on state government establishing a system of real-time testing and reporting." While a comprehensive solution cannot rely solely on real-time testing and reporting, the fact that the state's current testing protocol does not provide real time notification of dangerous bacteria levels is the single largest impediment to protecting the safety of citizens who use the state's water resources. Regrettably, the introduced versions of SB 1012 (filed by Senator Lager) and SB 1006 (filed by Senator Schaefer) do not possess this key element.

- Governor Nixon's lake clean-up proposal should be seriously considered. In brief, the proposal seeks to deal with what is most likely the main cause of the high levels of E. coli contamination at the Lake: faulty septic tanks. There are 50,000 septic tanks at the Lake of the Ozarks currently not subject to state regulation. Governor Nixon wants to give the Department of Natural Resources the authority to declare bodies of water "distressed," at which point the agency could deny permits for new wastewater systems for such lakes, and it would begin inspecting wastewater treatment facilities, including septic systems. Any systems or facilities violating water standards would have to connect with a sewer system or be closed. If the Legislature is serious about cleaning up the Lake of the Ozarks, the outdated, malfunctioning septic issue must be addressed.
- Require the adoption of a plumbing code in counties with a "water of the state" that borders or runs through a state or national park. This requirement would pertain to all residential and commercial buildings.³

³ This recommendation is similar to a recommendation contained in the Majority Report.

- The Department of Natural Resources lacks the financial resources to properly ensure water quality in Missouri. The agency's budget has been repeatedly cut. At a minimum, the General Assembly should debate the advantages and disadvantages of fully funding an expanded clean water program at the department as well as how the General Assembly might fund this augmented initiative, whether by means of the appropriation of additional general revenue or an increase in wastewater discharge permit fees, or both.
- All state agencies, including the Department of Natural Resources, should be required to provide additional and enhanced Sunshine Law training.
- The public good would be well served by requiring better communication between the Department of Natural Resources and the Department of Health as there appears to be a lack of collaboration between the two departments with regard to water testing. There also appears to be a disconnection between the scientific personnel involved in data collection and analysis and the people responsible for ensuring public health.
- There should be a clear understanding of the purpose of each water quality testing program. Should the data from a multi-year, health of the lake study, whose data is obsolete soon after its collection, be used determine if it's safe to swim?
- The Majority Report's RECOMMENDATIONS section contains several points suggesting a movement of all water quality testing programs from the Department of Natural Resources to the Department of Health. Further, the report suggests merging the Environmental Services Program into the Department of Health as well. While the signers of this Minority Report are willing to discuss the potential advantages and disadvantages of such a transfer; this idea, like the preponderance of the Majority Report itself, needs much more careful thought and analysis of cost before being acted upon.
- All test results regarding public health and safety should be reported in a timely, efficient, and uniform manner, regardless if the results are normal or

elevated. When possible, proper context should be provided by the department regarding any result that may appear to threaten public health and safety.

- There should be a full accounting of costs incurred by the state as a result the Commerce Committee's overly partisan investigation into this matter.